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## I.

## INTRODUCTION: THE CENTRAL POLICY ISSUE

This case concerns whether and how Southern Bell Telephone and Telegraph Company ("SBT") shall be permitted to compete in the intrastate telecommunications market for voice messaging services ("VMS"). Insomuch as VMS is but one segment of a broader set of services called enhanced services ("ES"), the case also presents the more general issue whether and how SBT shall be permitted to compete in the intrastate ES market.[1]

The central policy issue to be decided and the general circumstances that frame it are succinctly stated as follows. SBT is the monopoly controller of the local telephone system. As such, it has both the opportunity and interest to behave anti-competitively if allowed uncontrolled presence in competitive markets. However, SBT's presence in those markets, under conditions where it does not abuse its monopoly position, may actually promote development of an efficient, competitive ES market. The central question before the Commission therefore is: What regulatory approach to SBT's entry into the ES market will best guard against monopoly abuse of that market, but foster its development to its efficient, competitive extremes to the benefit of consumers and the State?

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[1]Throughout this Order unless otherwise noted, the terms "VMS," "VMS market," "ES," or "ES market" refer to the intrastate telecommunications portion of the voice messaging service market or enhanced services market, which is the only portion of those respective markets regulated by this Commission. In addition, unless otherwise noted, reference to ES and/or ES market includes reference to VMS and/or VMS market.

The principal fact matters determined by the Commission in this case are whether, under current circumstances, SBT has the opportunity and incentive to abuse its monopoly control of the local telephone system to the detriment of fair competition in the VMS market and whether SBT has done so. The Commission finds that SBT does have that opportunity and incentive. The Commission also finds that the evidence in this case indicates that SBT has actually used its monopoly position to deter competition in the VMS market. See, Part III.

Based on these findings, the Commission articulates the overall regulatory policy that will govern SBT's presence in the ES market, plus fashions the specific regulatory framework pursuant to which SBT shall be permitted to compete in the VMS market. See, Part IV. The Commission determines that the best policy is to promote competition in the ES market so that it will develop to its efficient, competitive extreme. Achievement of this policy means that SBT's presence in the ES market must be regulated until that market develops to a stage of complete competition. Once that stage is reached, the competitive balance of the market should eliminate the need for regulation to prevent the type of abuse of monopoly control of the local telephone network by SBT that deters or defeats competition.

SBT's current presence in the VMS market is basically uncontrolled. The Commission has determined that SBT has the opportunity and incentive to behave anticompetitively in that market in order to favor its MemoryCall℠ service over other

competitive VMS options. The Commission has further determined that SBT has in fact behaved anticompetitively with respect to its trial offer of MemoryCall℠ service, with inevitable and likely irreparable damage to the VMS marketplace. The full scope and extent of this damage and of SBT's anticompetitive behavior cannot presently be determined by the Commission, given SBT's failure to comply with the Commission's earlier directive that SBT file with the Commission sufficient cost data to allow a determination as to whether MemoryCall℠ service is being predatorily priced. The Commission therefore determines that SBT's current provision of MemoryCall℠ service must be frozen in order to halt SBT's anticompetitive behavior pending filing by Southern Bell of a complete cost of service study for MemoryCall℠ service, including all workpapers thereto, and pending Commission design and implementation of appropriate regulatory controls to prevent and/or deter monopoly abuse. The Commission therefore undertakes certain analyses and actions to develop the appropriate set of regulatory controls. See, Part V.

## II.

## JURISDICTION AND AUTHORITY TO REGULATE SBT'S PROVISION OF MEMORYCALL℠ SERVICE

Several statutes confer jurisdiction and authority upon the Commission to regulate SBT's provision of MemoryCall℠ service under the conditions presented by this case. The Commission's general jurisdiction and authority is contained in O.C.G.A. § 46-2-20, which provides, in pertinent part, as follows:

> (a) Except as otherwise provided by law, the commission shall have the general supervision of all . . . telephone and telegraph companies . . . within this state;
>
> (b) The commission may hear complaints; in addition, it is also authorized to perform the duties imposed upon it of its own initiative.
>
> (c) The commission may . . . by special orders in particular cases, require all companies under its supervision to establish and maintain such public services and facilities as may be reasonable and just.
>
> (e) The commission shall have authority to examine the affairs of all companies under its supervision and to keep informed as to . . . the manner in which the lines owned, leased, or controlled by them are managed, conducted, and operated . . . with reference to their compliance with all laws [and] orders of the commission . . . .

The Commission has also received specific statutory jurisdiction and authority with regard to telephone companies and their services. O.C.G.A. § 46-2-21(b)(4) provides, in pertinent part, as follows:

> (b) The powers and duties conferred . . . upon the commission and its authority and control shall also extend to:
>
> (4) Telegraph or telephone companies, or persons owning, leasing, or operating a public telephone service or telephone lines in this state.

The Commission has exercised jurisdiction and authority over SBT for many years. No serious suggestion is made that SBT is outside the reach of the Commission's jurisdiction and authority. However, it appears that SBT obliquely contends that the Commission

nevertheless does not have jurisdiction and authority to regulate SBT's provision of MemoryCall℠ service.[2] It appears that SBT may contend that while SBT is a telephone company subject to the Commission's regulatory jurisdiction and authority under § 46-2-21(b)(4), MemoryCall℠ is not a telephone service subject to the Commission's jurisdiction within the meaning of § 46-2-21(b)(4) and therefore the Commission may not regulate SBT's provision of MemoryCall℠. If SBT's Motion raises this contention, it is wholly without merit.

At bottom, the contention fails because MemoryCall℠ is a telephone service. Indeed, any service provided by SBT that is integrally connected to its ownership, control and operation of its monopoly local service telephone system is a telephone service within the meaning of O.C.G.A. § 46-2-21(b)(4). It is indisputable that SBT's provision of MemoryCall℠ service is integrally connected to SBT's ownership, control and operation of its monopoly local service telephone system. For this reason alone, the Commission has jurisdiction to regulate SBT's provision of MemoryCall℠ service.

## III.

## SBT'S OPPORTUNITY AND INCENTIVE TO ABUSE AND ITS ACTUAL ABUSE OF ITS MONOPOLY POSITION

This case does not arise in a vacuum apart from the significant events of the last decade that have reshaped the

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[2] See, SBT's "Motion to Expand the Scope of the Docket and Reschedule the Hearings," filed April 15, 1991, p. 2.

telecommunications industry. Rather, it fits in the stream of events stemming from federal court divestiture of the Bell System in 1982 and the FCC's subsequent efforts to regulate interstate enhanced services provided by the BOCs. Those bodies have found that the BOCs' monopoly control of the local network bottleneck gives the BOCs the opportunity and incentive to discriminate against competitors regarding access to the local network and to cross-subsidize competitive businesses by shifting costs to the regulated side and/or by using profits from the regulated side to underwrite competitive ventures.

In addition to the findings and conclusion of the federal courts and the FCC, the evidence presented in this docket also shows the opportunity and incentive of SBT to behave anticompetitively with respect to the VMS market. Indeed, beyond the mere opportunity and incentive to behave anticompetitively, the evidence demonstrates actual anticompetitive behavior by SBT with respect to network access and marketing through control of the local network, plus the possible but as yet undetermined cross-subsidy of MemoryCall™ through predatory pricing.

A. Federal Antitrust Litigation Findings

In 1982, American Telephone & Telegraph Company ("AT&T") was divested of 22 of its operating companies (the Bell Operating Companies, or "BOCs") by a federal court pursuant to a consent decree entered in a federal government antitrust case. In that case the federal court determined that monopoly control of the local telephone system by AT&T through its ownership of the BOCs

was used to defeat competition in several broad telecommunications markets. In order to avoid subsequent similar anticompetitive behavior by the BOCs, who after divestiture would continue their monopoly control of the local telephone system, the antitrust court imposed severe line of business restrictions upon the divested BOCs. One restriction concerned information services, a category that includes ES and VMS. Various orders of the federal court imposing the information services line of business restriction establish that BOC monopoly control of the local telephone system provides the opportunity and incentive to behave anticompetitively in the information services market. The relevant portion of these decisions are briefly discussed herein as a partial basis for the Commission's finding that SBT has the opportunity and incentive to behave anticompetitively in the ES market if its presence in that market is uncontrolled.[3]

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[3]The Commission takes notice of the following decisions rendered by the federal court in the antitrust case.

1. United States v. American Telephone and Telegraph Company, 552 F.Supp. 131 (D.D.C. 1982). Hereafter, this opinion is referred to as the "Modification of Final Judgment" or "MFJ." The final decree implementing the antitrust settlement, entered in 1983, is referred to as the "MFJ Decree." The District Court for the District of Columbia that issued the MFJ and MFJ Decree is referred to as the "antitrust court."

2. United States v. Western Electric Company, Inc., 592 F.Supp. 846 (D.D.C. 1984). Hereafter, this antitrust court opinion is referred to as "Western Electric (1984)."

3. United States v. Western Electric Company, Inc., 673 F.Supp. 525 (D.D.C. 1987). Hereafter, this antitrust court opinion is referred to as "Western Electric (1987)."

1. The Modification of Final Judgment

The MFJ determined that AT&T behaved anticompetitively by using its monopoly control of the local telephone system to defeat competition. It further determined that divestiture is the necessary remedy to curb that abuse. The antitrust court also noted, however, that after divestiture the BOCs would retain monopoly control of the local telephone system and therefore the risk of anticompetitive behavior would continue, this time through the BOCs.

> The key to the Bell System's power to impede competition has been its control of local telephone service. The local telephone network functions as the gateway to individual telephone subscribers. . . . The enormous cost of the wires, cables, switches, and other transmission facilities which comprise that network has completely insulated it from competition. Thus, access to [the] local network is crucial if [there] are to be viable competitors.
>
> AT&T has allegedly used its control of this local monopoly to disadvantage these competitors in two principal ways. First, it has attempted to prevent [competitors] from gaining access to the local network, or to delay that access, thus placing them in an inferior position vis-a-vis AT&T's own services. Second, it has supposedly used profits earned from the monopoly local telephone operations to subsidize its [competitive] businesses . . . .
>
> . . .
>
> After the divestiture, the Operating Companies will possess a monopoly over local telephone

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4. United States v. Western Electric Company, Inc., 714 F.Supp. 1, (D.D.C. 1988) affirmed in part and overturned in part in United States v. Western Electric Company, Inc., 900 F.2d 283 (D.C. Cir. 1990). Hereafter, this antitrust court opinion is referred to as the "VMS Waiver Order."

> service. . . . Restrictions [will be imposed on the BOCs] based on an assessment of the realistic circumstances of the relevant markets, including the Operating Companies' ability to engage in anticompetitive behavior, their potential contribution to the market as an added competitor for AT&T, as well as upon the effects of the restrictions on the rates for local telephone service.
>
> This standard requires that the Operating Companies be prohibited from providing long distance services and information services, and from manufacturing equipment used in the telecommunications industry. Participation in these fields carries with it a substantial risk that the Operating Companies will use the same anticompetitive techniques used by AT&T in order to thwart the growth of their own competitors. Moreover, contrary to the assumptions made by some, Operating Company involvement in these areas could not legitimately generate subsidies for local rates. Such involvement could produce substantial profits only if the local companies used their monopoly position to dislodge competitors or to provide subsidy for their competitive services or products--the very behavior the decree seeks to prevent.

MFJ, pp. 223-224 (bracketed material supplied, some material omitted).

The antitrust court recognized the possibility that over time the BOCs may "lose the ability to leverage their monopoly power into the competitive markets from which they now must be barred." MFJ, p. 194. Consequently, the antitrust court created a means whereby the BOCs could petition to have the restrictions modified or removed where conditions warrant. Under Section VIII(C) of the MFJ Decree, the antitrust court provided that a restriction would "be removed upon a showing that there is no substantial possibility that an Operating Company could use its monopoly power to impede

competition in the relevant market." MFJ, p. 195, footnote omitted.

2. Subsequent Decisions in Waiver Request Cases

a. Western Electric (1984)

The BOCs immediately began petitioning the antitrust court for waivers of the line of business restrictions. In Western Electric (1984), the antitrust court soundly rejected the requests, reaffirming its recognition of the underlying reason for the line of business restrictions, namely, continued BOC opportunity and incentive to abuse its monopoly control of the local telephone service to defeat competition. The specific analyses of the antitrust court are relevant to this proceeding. Reviewing the underlying basis for the line of business restrictions and the concrete problems of BOC anticompetitive behavior, the antitrust court imposed a separate subsidiary requirement as a condition for waivers.

(1) The Underlying Basis for Line of Business Restrictions

The antitrust court reaffirmed the underlying basis for the line of business restrictions.[4] It concluded that requests for waiver must be evaluated in that context.

> Contrary to the claims of some of the Regional Holding Companies, the inclusion of Section VIII(C) in the decree [allowing waivers] is not evidence of a general policy in favor of their diversification. That provision was included so that these companies could, at some later time, engage in nonregulated activities on a carefully controlled basis.

[4] See, Western Electric (1984), pp. 851-52.

Western Electric (1984), p. 858 (bracketed material and underlining added).

### (2) The Concrete Problems of Anticompetitive Behavior

The antitrust court carefully noted three prime areas of actual or potential abuse by the BOCs: (1) Discrimination in access to bottleneck facilities; (2) cross-subsidization; and (3) exploitation of marketing advantages stemming from their local exchange monopoly.

#### (a) Access Discrimination

With respect to access discrimination, the antitrust court noted that the risk of use of monopoly power for anticompetitive purposes lessens as the connection between the competitive market sought to be entered and local exchange service becomes more attenuated. In the antitrust court's view, this

> is so because products or services in unrelated fields are not dependent upon interconnection to the [BOCs'] monopoly bottleneck facilities, and discriminatory access therefore cannot injure [those who] compete with them.

Western Electric (1984), p. 853, (bracketed material supplied).[5]

#### (b) Cross-Subsidization

The antitrust court also recognized that competition is readily impeded by cross-subsidization, defined as "a subsidy to a new, competitive line of business with profits earned from or

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[5]It is obvious, however, that the inverse of this observation holds where, as in this case, the ability of Georgia VMS competitors to compete with MemoryCall® service depends upon their non-discriminatory access to the local bottleneck.

assets held by the existing, regulated monopoly line of business."

Id. It was reasoned that

> as long as a Regional Holding Company is engaged in both monopoly and competitive activities, it will have the incentive as well as the ability to "milk" the rate-of-return regulated monopoly affiliate to subsidize its competitive ventures and thereby to undersell its rivals in the markets where there is competition.

Id.

The antitrust court analyzed the specific forms that cross-subsidy might take, explaining that

> [o]ne such practice would be the misallocation of common costs. To the extent that a Regional Holding Company used the same facilities, equipment, and personnel to serve both its regulated and its unregulated activities, it would have the ability to overallocate the costs assigned to the former in order to maximize the amount that would be passed onto the ratepayers (who have no choice but to pay). Not only would this improper assignment of costs burden the ratepayers; it would also enable the company profitably to charge less for its competitive products and services than do its rivals who enjoy no such subsidy.

Id., footnote omitted. One BOC proposal to be allowed to engage in the office equipment business was found to be particularly instructive of the cross subsidy problem.

> Nynex's proposal for an office equipment venture illustrates this problem. Under that company's proposal, over 75 percent of the employees of its Business Information Systems Company (BISC) subsidiary will be located in a sales division that will also serve as the sales agent for its telephone exchange services. Under this arrangement, Nynex could easily manipulate the common costs of the BISC and Operating Companies so that the ratepayers would subsidize the office equipment business.

Id., f.n. 12. Other potential cross-subsidy abuses were noted.

> A Regional Holding Company could also subsidize its competitive ventures by transferring assets from its regulated affiliates to its unregulated affiliates at less than their cost or below their market value. Such a practice would not only adversely affect the ratepayers who ultimately fund the research and development costs of the transferred assets, but it would, once again, impede fair and effective competition in the competitive market: this cross subsidization would give the company's unregulated enterprise an obvious and improper advantage over its competitors. Conversely, a regulated affiliate could "purchase" assets from the unregulated affiliate at a price above their market value and pass on the extra costs to the ratepayers.

Id., p. 854, footnotes omitted.

The antitrust court recognized the special potential for cross-subsidy abuse where a BOC is developing regulated assets in anticipation of their use in competitive markets.

> An affiliate which develops an asset in its regulated market in anticipation of its potential use in the competitive market would have the incentive to add features or capabilities beyond those required for the provision of local telephone service in order to enhance the asset's market value. As a result, the ratepayers would subsidize the unregulated businesses by paying for "extras" which benefit only those businesses. Indeed, the ratepayers might bear the entire risk of researching and developing these assets because a Regional Holding Company would transfer from its regulated to its unregulated affiliate only those projects which turn out to be successful. Conversely, if the unregulated affiliate developed an asset and sold it to the Operating Company at the full cost of development, a cross subsidy would occur if the asset possessed features or capabilities beyond those required for the provision of the local service.

Id., f.n. 15.

(c) Exploitation of Marketing Advantages Stemming from the Local Exchange Monopoly

The BOCs have a unique position because they are the contact point for the telephone public. This position provides special opportunities for anticompetitive behavior, in the view of the antitrust court.

> In addition to cross subsidization, a Regional Holding Company could impede competition in markets unrelated to telecommunications by exploiting the marketing advantages stemming from its local exchange monopoly. The company would have a unique advantage over its competitors if, for example, it "bundled" its regulated monopoly services with its competitive products or services, or if it advertised, and in fact provided to its customers in the competitive market, more timely telecommunications service, preferential access, or both.

Id., p. 854 The antitrust court believed that "[s]uch practices are especially likely to occur if the regulated and unregulated services are marketed by a single sales staff." Id., f.n. 17.

(3) Separate Subsidiary Requirement

Based on these and other analyses, the antitrust court imposed a separate subsidiary requirement, holding that

> . . . [i]t is generally agreed that if the Regional Holding Companies conducted competitive activities through separate subsidiaries, intracompany transactions would become more apparent and thus cross subsidization and other anticompetitive conduct could more easily be prevented or rectified. . . . Accordingly, while, as a general matter, the Court is not eager to require the establishment of separate subsidiaries, that measure is warranted in this situation, and it will be required.

Id., pp. 870-71, footnote omitted.

In summary, the antitrust court concluded that the MFJ Decree was entered

> to eliminate anticompetitive conditions in the telecommunications industry. . . . Under the decree, the Regional Holding Companies play an essential role--they are to provide efficient, economical, and, if possible, technologically advanced local telephone service. Their role is not to provide a source of ratepayer funds, credit, and other assets to finance competitive ventures, nor were they meant to be vast conglomerates in which telephone service is relegated to a subordinate place. . . .
>
> The decree contemplates that AT&T, as a company now engaged in competitive business, could enter various new fields as it sees fit; it did not contemplate such entry for the Regional Holding Companies except on a limited and slowly-evolving basis. The reason is simple: these companies, unlike AT&T, retain what is in law and in reality a monopoly over a critical aspect of the nation's telephone service.
>
> . . . [T]here is the overriding principle that the Court is obligated under the decree to make certain that the Regional Holding Companies do not impede competition in the non-telecommunications markets they seek to enter. . . .
>
> The decree assumes, as does the Court, that the Regional Holding Companies may diversify on a significant scale only as they demonstrate . . . the improbability of their involvement in anticompetitive conduct based upon their monopoly status.

Id., pp. 874-875.

b. Western Electric (1987)

In 1987 the BOCs once again asked for waivers of all three line of business restrictions. In Western Electric (1987), the

antitrust court reexamined the opportunity and incentive of the BOCs to use their monopoly control over the local telephone network to defeat competition. The BOCs advanced their new request on the grounds that they no longer had monopoly control of the local telephone network, that there is no longer a Bell System because there are seven Regional Companies, and that, unlike at the time the MFJ Decree was entered, federal regulation is now sufficient to prevent anticompetitive abuses.

The antitrust court examined each of these contentions and found each wanting. The antitrust court concluded that the BOCs continued the same incentive and ability to use their monopoly control of the local service network to defeat competition as they had at the time of divestiture.[6]

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[6] See, Western Electric (1987), pp. 565-566, wherein with respect to the BOCs continued opportunity and incentive for monopoly abuse in the information services market, the antitrust court concluded

> there has been no change whatever in this respect since 1984, and no demonstration that now, unlike then, there is no substantial possibility that the Regional Companies could not, and indeed would not, use their monopoly power to impede competition in the information services market.
>
> . . .
>
> That the ability for abuse exists as does the incentive, of that there can be no doubt. As stated above, information services are fragile, and because of their fragility, time-sensitivity, and their negative reaction to even small degradations in transmission quality and speed, they are most easily subject to destruction by those who control their transmission. Among the more obvious means of anticompetitive action in this regard are increases in the rates for those switched and private line services upon which Regional

The antitrust court did carve out one area for waiver: Information services transmission. It did so based on a cost/benefit analysis, as follows.

> After considering the subject in some detail and with great care, the Court has become convinced, first, that, if the authority of the Regional Companies is carefully limited, the risk of anticompetitive action by these companies, while not insignificant, is, on balance, outweighed by other considerations; second, that the broad scale and the reasonable cost criteria necessary for a successful [information services transmission] system can be met only by permitting the Regional Companies to provide the necessary infrastructure components for efficient videotech services on an integrated basis; and third, that it is probable that a well-run, adequately publicized system could perform a useful service, and that it might attract a sufficient number of subscribers, so that it could operate on an economically sound basis.
>
> . . .
>
> For the reasons stated, the Court will exempt from the information services restriction the transmission of information generated by others . . . .

Western Electric (1987), pp. 591 and 597 (bracketed material supplied). The antitrust court invited those BOCs interested to

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> Company competitors depend while lower rates are maintained for Regional Company network services; manipulation of the quality of access lines; impairment of the speed, quality, and efficiency of dedicated private lines used by competitors; development of new information services to take advantage of planned, but not yet publicly known, changes in the underlying network; and use for Regional Company benefit of the knowledge of the design, nature, geographic coverage, and traffic patterns of competitive information service providers.

submit specific proposals for entry into the information services transmission business.

c. VMS Waiver Order

In March, 1988, the antitrust court granted a waiver to the BOCs under Section VIII(C) of the MFJ Decree, thereby permitting them "to engage in voice storage and retrieval services, including voice messaging . . . services." VMS Waiver Order, p. 23.[7]

Over opposition from VMS competitors, the antitrust court granted the waiver based on a public policy cost/benefit analysis.[8] The antitrust court concluded that a large VMS market exists that will not be effectively developed absent proper BOC participation.

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[7]The VMS Waiver Order distinguishes between information services content and information services transmission. The VMS Waiver Order denied the BOCs' request for waiver of the line of business restriction on information services content. Authority to offer services like MemoryCall℠ is covered by the waiver granted by the antitrust court to engage in information services transmission.

As earlier noted in f.n. 3 herein, a portion of the VMS Waiver Order was overturned on appeal. See, United States v. Western Electric Company, Inc., 900 F.2d 283, 305 (D.C. Cir. 1990) (" . . . the district court erred in applying section VIII(C) to the uncontested motion to remove the line-of-business restriction on information services. And because we are unable to say that the district court would have reached the same result had it applied the proper legal standard, we are constrained to remand the case for further consideration of the BOCs' motion to remove the information services ban in its entirety.") The portion overturned is the District Court's denial of the waiver request for information services content. It appears to the Commission that the waiver for information services transmission has remained (or will remain) intact.

[8]Those in opposition to the waiver argued principally two propositions: (1) Due to BOC monopoly of local switching services, "a competitive market for the delivery of [VMS] services to consumers is likely to develop only if the [BOCs] remain prohibited from providing them" and (2) the BOCs failed to show under Section VIII(C) of the MFJ Decree that there is a lack of competitive harm. VMS Waiver Order, pp. 18, 20, bracketed material supplied.

Recognizing the potential for BOC anti-competitive activity in the VMS market, the antitrust court nonetheless concluded that BOC entry into the VMS market was warranted.[9]

The antitrust court did not simply turn the BOCs loose in the information services arena to behave as they desire. In the context of granting waivers to enter the information services transmission arena, the antitrust court noted that

> ". . . Regional Company behavior in the information services field will be closely monitored. Should it become apparent that the flexibility granted herein is being abused,

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[9]Although finding the cost/benefit calculation a close call, the antitrust court concluded its cost/benefit analysis as follows:

> In the Court's opinion, several factors tip the balance in favor of Regional Company entry.
>
> First. In view of the fact that the core violations that were the subject of proof at the AT&T trial did not involve this market at all, there is less reason to believe that Regional Company involvement in this industry will lead to anti-competitive behavior than would, for example, its involvement in long distance, provision of information content, or manufacture of telecommunications products.
>
> Second. Due to the subtle competitive pressure exerted on this market by the presence of service bureaus, answering services, and particularly home answering machines, the ability to control prices and otherwise to operate monopolistically will be substantially diluted.
>
> . . .
>
> Third. In view of the largely inconclusive and speculative nature of the competitive considerations, other public policy factors should also be considered. In this context, the public interest heavily tips the balance in favor of the requests of the Regional Companies.
>
> The likelihood is that truly ubiquitous access to these services will not be had by the residential and small business consumer in the absence of Regional Company involvement. . . .

VMS Waiver Order, pp. 21-22, some material omitted.

> that local bottlenecks are being used to discriminate against competitors in the information services market, or that the information services are being subsidized by funds contributed by the ratepayers, the Court will take appropriate enforcement action. In fact, if the behavior of a particular Regional Company proves particularly egregious, the Court will not hesitate to rescind that violator's authority to engage in information transmission services altogether."

VMS Waiver Order, p. 18, footnote omitted.

B. Federal Communications Commission Findings

The Federal Communications Commission (FCC) has rendered several post-divestiture decisions regarding the conditions under which it shall allow the BOCs to offer interstate enhanced services. By necessity, each of those decisions addresses the opportunity and incentive of the BOCs to behave anticompetitively, principally from the point of view of preventing discriminatory access to the local system and impermissible cross-subsidy. The relevant portion of these decisions are briefly discussed herein as a partial basis for the Commission's finding in this case that SBT has both the opportunity and incentive to behave anticompetitively in the ES market if its presence therein is uncontrolled.[10]

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[10]The Commission takes notice of the following decisions rendered by the FCC, plus one Federal Appeals Court decision relating thereto.

1. Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Equipment by the Bell Operating Companies, CC Docket 83-115, Report and Order, 95 FCC 2d 1117 (1984), referred to hereafter as "BOC Separation Order," and FCC 84-252, 49 Fed.Reg. 26056 (1984), referred to hereafter as the "BOC Separation Reconsideration Order."

1. BOC Separation Order

Prior to divestiture, but after the entry of the MFJ and MFJ Decree, the FCC undertook to determine "whether the separate subsidiary requirements [previously adopted by the FCC for application to AT&T] are applicable to the [divested] Bell Operating Companies (BOCs) after they are divested by [AT&T] pursuant to the . . . (MFJ)."[11] The FCC ordered a separate subsidiary requirement for the BOC provision of enhanced services, stating

> We have determined in this proceeding that structural separation should be imposed on the divested BOCs in their offering of . . . enhanced services . . . . We have found that the benefits, and the ability to detect and prevent improper cost-shifting and other anticompetitive practices, outweigh the costs imposed on the BOCs in forming and operating through separate organizations.

BOC Separation Order, p. 23 (some material omitted).[12]

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2. FCC 86-252, CC Docket No. 85-229, Report and Order, June 19, 1986, which is the FCC Order in Computer Inquiry III, referred to hereafter as "CI-III."

3. People of the State of California v. Federal Communications Commission, 905 F.2d 1217 (9th Cir. 1990), referred to hereafter as "California v. FCC."

[11]BOC Separation Order, pp. 1-2, (bracketed material supplied).

[12]In its BOC Separation Reconsideration Order, at p. 7, the FCC made a fuller description of the rationale it had adopted in its BOC Separation Order.

> The order was based upon our findings that in light of current circumstances, a modified structural separation is necessary to ensure that BOC provision of . . . enhanced services does not lead to unreasonable rates for regulated services or diminished competition

The modified structural separation requirement for BOC provision of enhanced services adopted by the FCC prohibited, among other things, joint billing and joint marketing. The FCC found that these type of joint activities posed far too great an opportunity for anticompetitive behavior by the BOCs that might hinder competition in the ES market.[13] Part of the rationale for

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> in the provision of . . . enhanced services. Absent modified structural separation it would be more difficult to control the regionals' ability to cross-subsidize competitive offerings or to discriminate in the interconnection of competitors' offerings. The benefit to consumers of controlling such potential conduct outweigh the cost of separation. We do recognize the possible inefficiencies inherent in structural separation. Structural separation may reduce possible economies of scale and scope. Public services might be provided more cheaply on an unseparated basis. However, until we have had the opportunity to measure the effect of structural separation on the regionals' provision of . . . enhanced services, structural separation is valuable to maximize the benefits and minimize the harms of the regionals' participation in these activities while we acquire experience which will enable us to adjust the structure under which this participation may be most beneficial.

[13]The FCC specifically found that

> Joint operations may allow the BOCs to prosper for reasons other than (1) that they provide a price and quality combination for unregulated products and services that is more attractive than what other suppliers provide, or (2) that they have lower costs. The BOCs could employ their monopoly position in network services to promote their own . . . enhanced services. Those activities involve a danger of anticompetitive practices (e.g., delayed service connection for subscribers purchasing a rival's CPE) and cost shifting (e.g., over-allocation toward monopoly services of a sales